FILE COPY

Office - Supreme Court, U.
FILED
SEP 2 1948
CHARLES ELMORE CROPL
CLER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 141

STANLEY H. BORAK,

Petitioner,

vs.

THE UNITED STATES

PETITIONER'S REPLY BRIEF

STANLEY H. BORAK,
Pro se.

INDEX

Subject Index

	Page
Petitioner's reply brief	1

Table of Cases Cited

Corfman v. *McDevitt*, 111 Colo. 437	3
Fitzsimmons v. *Brooklyn*, 102 N. Y. 536	2
Glavey v. *United States*, 182 U. S. 595	4
O'Neil v. *State*, 223 N. Y. 40	3
Shapiro v. *United States*, 107 Ct. Cls. 650	4
Smith v. *Board of Education*, 23 F. Supp. 328, 111 F. (2d) 573	2
State, ex rel. Dreskell v. *Miami*, 153 Fla. 90, 13 So. (2d) 707	2
United States v. *Addison*, 6 Wall. 290	2

Statutes Cited

Act of June 10, 1948	5
A.L.R., Vol. 150, p. 113-120	3
"Laws of Public Offices and Officers"—Mechem—p. 584, sec. 872	1
McQuillin—"Public Corporations," Revised Vol. 2, sec. 539, p. 319	1
Throop on "Public Officers," pp. 489-490	1
U. S. Code, Title 5, Sec. 652	5
U. S. Congressional Service—1948—No. 6—p. 3284	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 141

STANLEY H. BORAK,

Petitioner,

vs.

THE UNITED STATES

PETITIONER'S REPLY BRIEF

The Government's brief contains a number of statements requiring a reply.

I

Petitioner's position is that an *officer,* as distinguished from an *employee,* must recover the full salary of the office, without offset for earnings.[1]

The Government's brief indifferently lumps officers and employees together as "civil servants," and asserts (at p. 6) that the decisions announce but one rule of law uni-

---

[1] Corpus Juris and American Law Reports (Annotated), are quoted to such effect in petitioner's main brief (pp. 10, 14). Mechem says: "When the officer who has been unlawfully deprived of his office is found to be entitled to recover, the amount that he has earned in the interval at other employment is not to be deducted." ("The Law of Public Offices and Officers," p. 584, sec. 872). Throop on "Public Officers," agrees (pp. 489-90). Likewise, McQuillin, on "Public Corporations," Revised Vol. 2, sec. 539, p. 319).

formly applied to both, namely, that outside earnings during the period of dismissal are deductible from the salary of the office or employment. This is altogether erroneous.

In its brief below, the Government recognized the distinction:

> "It is true that the rule (of deduction of outside earnings) does not apply to an officer suing for his salary, for there the salary is attached to the office. *United States v. Addison,* 6 Wall. 290; *Smith v. Board of Education,* 23 F. Supp. 328, aff'd 111 F. (2d) 573; *Fitzsimmons v. Brooklyn,* 102 N. Y. 536." (p. 91, Government's brief in the Court of Claims).

In the *Addison* case (supra), the "complete in applicability" of which the Government's present brief asserts (p. 6, footnote), this Court held:

> "The rule which measures the damages upon a breach of contract for wages or for freight, or for the lease of buildings, has no application. In these cases, the party aggrieved must seek other employment, or other articles for carriage, or other tenants, and the damages recovered will be the difference between the amount stipulated and the amount actually received or paid. But no such rule can be applied to public offices of trust or confidence, the duties of which are not purely ministerial or clerical."
>
> (*United States* v. *Addison,* 6 Wall. 290, 298).

The *Smith* case (*supra*), cited by the Government below, accepts the rule of law of the *Fitzsimmons* case quoted in petitioner's main brief, at p. 11.

Nor do the cases cited in the Government's present brief (pp. 6, 7) hold that an *officer's* outside earnings during the period of dismissal are deductible. Indeed, they hold to the contrary.

In *State ex rel. Dreskell* v. *Miami,* 153 Fla. 90, 92, 93, 13 So. (2d) 707, cited twice in the Government's brief, and

cited with approval in *Corfman* v. *McDevitt*, 111 Colo. 437 (also cited by the Government), the Court expressly distinguished the rule applying to the deductibility of earnings of an *officer* from that applying to the earnings of an *employee*. In *Wittner, Weinstein, Kelly, Barton, Seltzer and LaChicotte*, also cited by the Government as controlling, the plaintiff in each case was held an *employee*, not an *officer*. *Stockton* and *State Board* also cited by the Government, followed the *Kelly* case.

The Government's brief also cites 150 A. L. R. 113-120 in support of its contention. This annotation, which begins at page 100 of volume 150, shows, as Judge Madden pointed out, that the authorities are practically unanimous in holding that as to *officers*, outside earnings do not constitute an offset.

The overwhelming weight of State, as well as Federal authority, declares that the earnings of an *officer* during the period of dismissal, are not deductible from the salary of the office to which he is entitled, contrary to the majority holding below.[2]

II

Contrary to the Government's suggestion (p. 2), the Act of June 10, 1948, is not involved in the determination of the

---

[2] The Government's brief suggests denial of the petition upon grounds which should be brought forward only in a cross-petition, since they were raised by the Government in the Court below, and rejected. *Inter alia*, it is suggested: (a) that "there may be doubt as to whether he (petitioner) was an officer or employee" (p. 6). The Court of Claims expressly ruled that plaintiff was an *officer* (R. 15, 16). It is further suggested that there was a "replacement" of petitioner, thereby making the *Fitzsimmons* case "obviously inapplicable." This was similarly adversely decided against the Government, the finding being made that petitioner was not "replaced" (R. 12). Accordingly, the *Barmonde* and *Mullane* cases cited in the Government's brief (p. 9) are completely inapplicable, and the rule of the *Fitzsimmons* case, is applicable. The *Fitzsimmons* case was followed by the New York Court of Appeals in *O'Neil* v. *State*, 223 N. Y. 40, 44.

question presented. That Act has prospective application only,[3] and the same is sharply circumscribed.

Nor, as the Government brief further asserts (p. 11), is the recurrence of the question here presented "eliminated." The question presented remains of continuing importance in Federal, as well as State, jurisprudence.

Cabinet officers, judges, postmasters, and the many other civil officers of lesser rank who are not in the "classified civil service" will at no time be affected by the amendment, in the event that any of them is wrongfully dismissed (*Humphrey's Excr.* v. *United States,* 295 U. S. 602). The identical question will recur.

Nor do the provisions of the amendment apply to army officers. Any of them wrongfully dismissed (*Shapiro* v. *United States,* 107 Ct. Cls. 650) will posit exactly the same question here presented.

Moreover, the amendment, being by its express terms prospective, as aforesaid, will not apply at all to causes of action presently accrued. Indeed, there are several cases involving the same issues presently pending.[4]

But the Government's brief also disregards the fact that the court below deducted the plaintiff's outside earnings on the ground of "just credit," thus bringing it in conflict also with the line of Federal cases which declares that there can be no such "just credit" asserted against the right of an officer to the salary incident to the office, under principles of public policy. (*Glavey* v. *United States,* 182 U. S. 595, and other cases cited in petitioner's main brief.)

The continuing importance of the question presented is thus evident.

---

[3] Section 2 of the said Act expressly provides that its application is prospective only.

[4] See "Conference Report"—U. S. Code Congressional Service—1948—No. 6—at p. 3284.

III

The Government's assertion that the petitioner has been "indemnified" (pp. 7-8) is contrary to the fact found by the Court of Claims (R. 13) that more than five hundred dollars (increased by subsequent printing expenses in that court) was required to be spent by petitioner in connection with this litigation.

The word "indemnity" cannot fairly describe a situation where more than one-third of the amount recovered has had to be spent in necessary expenses (omitting attorney's fees) of litigation required to redress the unjust dismissal which the Government has always sought to gloss over. In addition to deprivation of salary,[5] intangible but real loss followed, as previously stated (petition pp. 5, 15).

The trend of modern jurisprudence and legislation is to grant full indemnity to the citizen injured by wrongful governmental action.[6]

Conclusion

The new amendment to sec. 652 of Title 5 (Act of June 10, 1948) does not materially affect the likelihood of recurrence of the question of law presented, important alike to Federal and State jurisprudence.

---

[5] The Government's brief declares: "Petitioner at no time contended that in his capacity as Naturalization Examiner he would have been able to devote any of his time to the private practice of law" (p. 5). This was never within the issues of the case. However, recent opinions of the Attorney General find no bar generally to the conduct of any private business by an officer, or to the receipt by him of income from the earnings of a law partnership (Op. A. G. Vol. 40, Nos. 47 and 48).

[6] For instance, the recently enacted Federal Tort Claims Act, allowing recovery of damages against the Government for torts, provides for costs in all courts to be awarded the successful claimant to the same extent as if the United States were a private litigant. 28 U.S.C. 931. Petitioner was denied costs in all courts.

The petition should be granted for the reasons which have been stated.

Respectfully submitted,

STANLEY H. BORAK,
Petitioner Pro Se.

(8118)